No. 86-1327

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In the Supreme Court of the United States

OCTOBER TERM, 1986

MEDALLION KITCHENS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly concluded that economic strikers who have made an unconditional offer to return to work must be reinstated in preference to temporary strike replacements who are in layoff status at the time the unconditional offer is made.

2. Whether, in the circumstances of this case, petitioner had fair notice of the General Counsel's theory of unfair labor practice liability and was afforded a full opportunity to develop its affirmative defense to that theory.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 806 F.2d 185. The decision and order of the National Labor Relations Board (Pet. App. A14-A26), including the decision of the administrative law judge (Pet. App. A26-A45), are reported at 275 N.L.R.B. 58.

JURISDICTION

The judgment of the court of appeals (Pet. App. A46) was entered on November 26, 1986. The petition for a writ of certiorari was filed on January 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Medallion Kitchens, Inc., is a Minnesota corporation located in Fergus Falls, Minnesota, where it is engaged in the manufacture and non-retail sale and

distribution of kitchen and bathroom cabinets. In 1983, petitioner's 279 plant production and maintenance employees were represented by Local 1267 of the United Automobile Workers Union. A collective bargaining agreement between petitioner and the Union expired on September 19, 1983. No new agreement was reached, and almost all of the bargaining unit employees went out on strike. Petitioner continued to operate with a full complement of approximately 250 employees, consisting of the few employees who never went on strike and others who went on strike but returned shortly thereafter (collectively referred to as "non-strikers"), plus strike replacements hired after the strike began. The replacements were told that a strike was in progress and that their employment would last only for the duration of the strike. Pet. App. A2-A3, A27-A32.

On December 10, 1983, a fire destroyed the plant's main building. Production ceased, and all but about 20 to 30 employees were laid off.[1] Through telephone calls, at a meeting at the plant on December 15, and at a Christmas party on December 17, petitioner assured the idled employees that it was making every effort to reopen the plant and to put everyone back to work as soon as possible. The employees were asked to leave their current phone numbers with petitioner, and to be ready to return to work when contacted. Pet. App. A3, A28, A31.

On December 19, the union, on behalf of all strikers, made an unconditional offer to return to work on December 26, and the following day almost all of the strikers made individual requests for reinstatement. Beginning in early January, and thereafter as production resumed, petitioner recalled laid-off non-strikers and replacements, but it did not reinstate any former strikers. Pet. App. A4, A28-A29.

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[1]Some of the employees who continued to work after the fire were non-strikers; others were strike replacements (Tr. 41, 42).

2. a. The Board issued a complaint alleging that petitioner had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by failing to reinstate the striking employees.[2] In his opening statement at a hearing before an administrative law judge (ALJ), petitioner's counsel indicated that petitioner would rely on the rule, adopted in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), that an employer is entitled to hire and retain permanent replacements for economic strikers (Pet. App. A30-A31). The General Counsel did not dispute that general proposition, but the General Counsel's first witness was petitioner's personnel director, Richard McGrady, who testified that the strike replacements had been hired on a temporary basis—in his words, "until the strike was over"—and that the replacements had been expressly so informed (*id.* at A34-A35).[3] Petitioner's

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[2]The pertinent portions of the complaint are reprinted in the court of appeals' opinion at Pet. App. A5.

[3]Under questioning by the General Counsel, petitioner's personnel director testified as follows (Pet. App. A31-A32):

Q. When you first began interviewing replacement employees, did you interview most of those people?

A. Yes sir.

Q. Do you recall hiring Marty Beckman?

A. I remember Marty Beckman. I believe he was hired at the Holiday Inn, but I'm not sure.

* * * * *

Q. Did you tell Mr. Beckman how long he would be working?

A. No, sir. At that time we didn't know. I told him it might be a week, it might be less and it might be more.

Q. Is that essentially what you told everybody who got hired?

A. Yes, Sir.

Q. That it might be a week, it might be less, it might be a little more?

counsel did not object to the questions or to the testimony (*id.* at A35).[4]

b. In its post-hearing brief to the ALJ, petitioner argued that by mid-November the strike replacements had become permanent employees, that they had been so advised by McGrady before and after the fire, and that, as permanent employees, they were entitled to be recalled after the fire ahead of strikers seeking reinstatement (Pet. App. A33). The General Counsel argued that the strike replacements were only temporary employees who had no right to be recalled ahead of unreinstated strikers.[5] Petitioner moved to strike the General Counsel's brief to the extent that it relied on evidence showing that the replacement employees had been hired on a temporary basis, on the ground that petitioner had been misled into assuming that the permanent status of the replacements was not in issue (*id.* at A33). In the alternative, petitioner moved to reopen the hearing to present additional evidence on this matter (*id.* at A33-A34).

A. They could work up until the strike was over.

Q. Until the strike was over?

A. Or the people come back.

[4]When McGrady was later recalled as petitioner's witness, he testified as to post-fire assurances to idled employees that the plant would be reopened (Pet. App. A11, A33). His earlier testimony that replacements had been hired only for the duration of the strike, however, was "essentially uncontroverted" (*id.* at A11).

[5]In the alternative, the General Counsel argued that the replacements, even if permanent employees, could not be recalled before more senior former strikers, because the replacements had been displaced for some weeks as the result of the fire. See *Giddings & Lewis*, 255 N.L.R.B. 742 (1981), enforcement denied, 675 F.2d 926 (7th Cir. 1982). The ALJ did not pass on this alternative contention, and the Board also found it unnecessary to do so (Pet. App. A15 n.2).

The ALJ denied petitioner's motion (Pet. App. A34-A36). The ALJ found that the opening statement and the arguments advanced by petitioner's counsel showed that petitioner knew that permanence was an essential element of its defense (*id.* at A34-A35). In addition, the ALJ found that the General Counsel's questioning of petitioner's personnel director had placed the question of permanence in issue (*id.* at A35). The ALJ concluded that the evidence as to the status of the strike replacements was "certainly relevant, was not improperly received in this case, * * * did not raise a new issue, * * * did not give rise to a new issue of newly discovered evidence, and * * * certainly was not a surprise to [petitioner]" (*id.* at A36).

The ALJ ruled that the employment of permanent replacements is an affirmative defense to a charge of an unlawful failure to reinstate economic strikers and that the burden of proving this justification rests on the employer (Pet. App. A36). Relying on the record evidence, the ALJ found that petitioner had failed to carry its burden of proof on this defense, which was the only justification petitioner asserted for its failure to reinstate the former strikers (*id.* at A36-A37).[6]

3. The Board adopted the findings and conclusions of the ALJ (Pet. App. A15).[7]

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[6]The ALJ found that the strike replacements had been hired as temporary replacements. The ALJ also found no evidence that the replacements were ever told that they had become permanent employees. Pet. App. A33.

[7]The Board did not address the argument in the petition, which petitioner did not make to the ALJ, that, absent evidence of an anti-union animus, commitments to strike replacements that fall short of offers of permanent employment may nevertheless constitute a sufficient business justification for preferring replacements to strikers. See Pet. App. A14-A24.

4. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A14). The court rejected petitioner's argument that it was denied due process because it had not been notified that the permanent status of the replacement employees was in issue (*id.* at A8). The General Counsel's theory, the court explained, was that petitioner committed an unfair labor practice by refusing to recall the striking employees, and that theory did not change during the proceedings (*ibid.*). The General Counsel was not required to allege that the replacement employees were not promised permanent employment, the court held, because petitioner had the burden of proof on that affirmative defense to establish that the replacements were permanent employees (*ibid.*).

The court also upheld the Board's finding that the replacements were temporary as supported by substantial evidence (Pet. App. A8-A14). The court further rejected petitioner's contention that the ALJ did not adequately consider whether petitioner had displayed an intention to treat the replacements as permanent (*id.* at A9-A11).

ARGUMENT

The court of appeals applied well settled law to the particular facts of this case. That court's decision is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no significant legal question. Accordingly, review by this Court is not warranted.

1. Petitioner asserts (Pet. 10-15) that this case presents the question whether the permanent replacement of economic strikers is the only legitimate and substantial business justification for refusing to reinstate economic strikers. In actuality, petitioner is simply quarreling with a finding of fact.

It is well settled that an employer who unjustifiably refuses to reinstate economic strikers after the conclusion of a strike commits an unfair labor practice, since the effect of the employer's action is to discourage employees from exercising their statutory rights to organize and to strike. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). However, during a strike the employer may hire replacements, in order to obtain the necessary labor force to maintain operations, and if the replacements have been hired on a permanent basis the employer may retain them in preference to striking employees who later offer to return to work. *Ibid; NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

The employer has the burden of proving that the replacements have in fact been hired on a permanent basis. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378. The Board and the courts of appeals have consistently held that the hiring of strike replacements is a justification for refusing to reinstate striking employees only if the replacements were informed, at the time they were hired or before the striking employees unconditionally offered to return to work, that they have received their jobs on a permanent basis. See, *e.g., Randall, Division of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1248 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983); *Associated Grocers*, 253 N.L.R.B. 31, 32 (1980), enforced *sub nom. Transport & Local Delivery Drivers, Local 104* v. *NLRB*, 672 F.2d 897 (D.C. Cir. 1981) (Table), cert. denied, 459 U.S. 825 (1982); *NLRB* v. *Mars Sales & Equipment Co.*, 626 F.2d 567, 573 (7th Cir. 1980); *NLRB* v. *Murray Products, Inc.*, 584 F.2d 934, 939 (9th Cir. 1978).

The decision below is fully consistent with the foregoing principles. Petitioner argued before the ALJ that, before the strikers offered to return to work, the strike replacements had been informed that they would be permanent

employees, but the ALJ made a factual finding that the strike replacements were only temporary (Pet. App. A32-A37), and the Board and the court of appeals upheld the ALJ's finding. Accordingly, the Board and court of appeals determined that petitioner failed to establish a "legitimate and substantial business justification[]" for refusing to reinstate the striking employees (*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378 (citation omitted)). Pet. App. A8-A11, A15.

Petitioner now argues that permanent replacement is not the only "legitimate and substantial" business justification for refusing to reinstate economic strikers. Although petitioner is correct in principle,[8] that principle does not aid him in this case. The only two justifications offered by petitioner —that it made "commitments" to the temporary replacements to insure adequate staffing for the clean-up and resumption of production, and that it is entitled to honor those commitments (Pet. 14)—simply restate its claim that the replacements were guaranteed permanent employment. That claim was rejected as a factual matter by the Board and the court of appeals,[9] and it does not warrant further review. This case therefore does not present an occasion to determine what other types of business justifications are "legitimate and substantial."

2. Petitioner also contends (Pet. 15-21) that the court of appeals erred in enforcing a Board order based on a legal theory not alleged in the Board's complaint. That claim,

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[8]For example, the absence of vacancies resulting from bona fide decreases in the required work force, whether or not strike-related, is one other such justification. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 379 (noting that the Board had taken this position). Petitioner did not assert any such justification in this case, however.

[9]The ALJ found that petitioner's assurances did not change the temporary status of the replacements (Pet. App. A33), the Board adopted that finding (*id.* at A15), and the Board's finding was upheld by the court of appeals (*id.* at A11).

which turns on the circumstances of this case, does not warrant further review. In any event, the decision below was correct.

The complaint stated the General Counsel's theory, which was that petitioner had violated the Act by recalling replacements rather than striking employees. Since hiring permanent employees is an affirmative defense on which the employer bears the burden of proof (see *NLRB* v. *International Van Lines*, 409 U.S. 48, 54 (1972) (Blackmun, J., concurring in the judgment); *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378), the General Counsel's allegation put petitioner on notice that it was obligated to prove that the replacements were permanent. Due process does not require more. A court is not barred from enforcing a finding by the Board of an unfair labor practice so long as the respondent was aware of the charge during the hearing and had a full and fair opportunity to litigate the matter. See, *e.g.*, *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. at 349-350; *NLRB* v. *International Association of Bridge Workers Local 433*, 600 F.2d 770, 775 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977).

Moreover, regardless of what petitioner's attorney may have assumed from the complaint, the testimony of the General Counsel's first witness (who was petitioner's personnel director) showed that the status of the replacements was in issue (see page 3, *supra*). Accordingly, the Board correctly found that petitioner was aware of the need to prove that the replacements were permanent and that petitioner had a full and fair opportunity to offer his proof on that issue (Pet. App. A34-A36). Petitioner's failure to do so was its own fault, not the General Counsel's.

Petitioner erroneously asserts (Pet. 17) that the decision below conflicts with decisions from other circuits. None of the decisions cited by petitioner holds that the General

Counsel must state in her complaint that the employees hired to replace economic strikers were temporary and not permanent. The only decision cited by petitioner similar to this case is *Presto Casting Co.* v. *NLRB*, 708 F.2d 495 (9th Cir.), cert. denied, 464 U.S. 994 (1983), but that case is factually distinguishable. There, the court refused to enforce the Board's order insofar as it held that the employer unlawfully refused to reinstate employees who had engaged in an economic strike. The court explained that, on the facts of that case, the employer did not have an opportunity to litigate the permanence issue fairly. *Id.* at 498. By contrast, in this case the court of appeals concluded that petitioner was aware of this issue and had a full and fair opportunity to litigate it. The remaining cases cited by petitioner hold only that a complaint must sufficiently inform the respondent of the alleged violation of the Act to enable the respondent to mount a defense.[10] The court below agreed with that

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[10]See *Conair Corp.* v. *NLRB*, 721 F.2d 1355, 1371-1373 (D.C. Cir. 1983) (a complaint alleging that an employer violated the Act by threatening to discharge employees could not support a finding that the employer violated the Act by actually discharging employees), cert. denied, 467 U.S. 1241 (1984); *NLRB* v. *Pepsi-Cola Bottling Co.*, 613 F.2d 267, 272-274 (10th Cir. 1980) (a charge of failing to reinstate unfair labor practice strikers cannot support a finding of discrimination in hiring on the basis of union activity, because an employer's intent is irrelevant with respect to a charged failure to reinstate unfair labor practice strikers, while anti-union motivation is an essential element of discriminatory refusal to hire); *Boyle's Famous Corned Beef Co.* v. *NLRB*, 400 F.2d 154, 161-165 (8th Cir. 1967) (a complaint alleging that an employer had assisted in the formation of a new union and dominated the new union could not serve as the basis for a finding that the employer unlawfully refused to bargain collectively with the union previously recognized as the bargaining representative).

The remaining court of appeals decisions cited by petitioner are wholly inapposite. *NLRB* v. *Sunnyland Packing Co., supra*, upheld the Board's finding on an unpled charge that the employer had applied a "no solicitation" rule in a discriminatory manner, because the court found that the employer had adequate notice of the allegation and a fair opportunity to litigate it. 557 F.2d at 1161-1162. Finally, *Clear Pine*

proposition (Pet. App. A6), and its application of that rule to the particular facts of this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Mouldings, Inc. v. *NLRB*, 632 F.2d 721, 728 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981), upheld an ALJ's decision to allow amendment of the complaint and to provide the respondent with six weeks of preparation time to meet a new allegation. The court did not rule, as petitioner suggests (Pet. 17), that an amendment and continuance are always necessary in such circumstances.